

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

ANDREW CORZO, SIA HENRY, ALEXANDER
LEO-GUERRA, MICHAEL MAERLENDER,
BRANDON PIYEVSKY, BENJAMIN SHUMATE,
BRITTANY TATIANA WEAVER, and
CAMERON WILLIAMS, individually and on
behalf of all others similarly situated,

Plaintiffs,

v.

BROWN UNIVERSITY, CALIFORNIA
INSTITUTE OF TECHNOLOGY, UNIVERSITY
OF CHICAGO, THE TRUSTEES OF COLUMBIA
UNIVERSITY IN THE CITY OF NEW YORK,
CORNELL UNIVERSITY, TRUSTEES OF
DARTMOUTH COLLEGE, DUKE UNIVERSITY,
EMORY UNIVERSITY, GEORGETOWN
UNIVERSITY, THE JOHNS HOPKINS
UNIVERSITY, MASSACHUSETTS INSTITUTE
OF TECHNOLOGY, NORTHWESTERN
UNIVERSITY, UNIVERSITY OF NOTRE DAME
DU LAC, THE TRUSTEES OF THE
UNIVERSITY OF PENNSYLVANIA, WILLIAM
MARSH RICE UNIVERSITY, VANDERBILT
UNIVERSITY, and YALE UNIVERSITY,

Defendants.

Case No.: 1:22-cv-00125

Hon. Matthew F. Kennelly

**EXHIBIT B TO CERTAIN
DEFENDANTS' MOTION FOR
ENTRY OF ORDER
REGARDING THE HEA
STATUTE AND PRODUCTION
OF CERTAIN FAFSA
INFORMATION**

**EXHIBIT B TO CERTAIN DEFENDANTS' MOTION FOR ENTRY OF ORDER
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Session #17

Financial Aid Data Use and Student Privacy

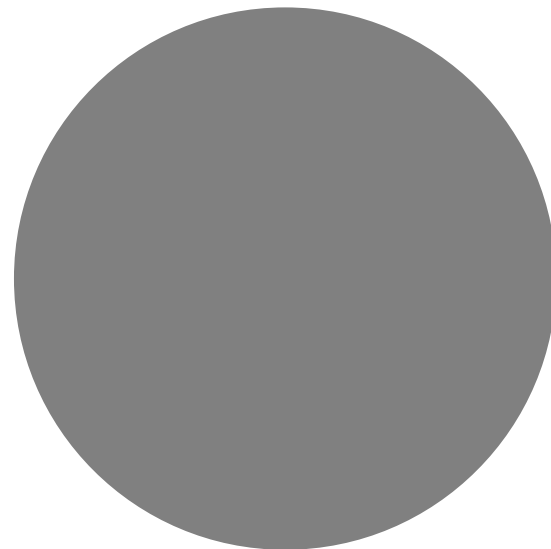
Benjamin Ferraro and Bruce Hughes
U.S. Department of Education

2019 FSA Training Conference *for Financial Aid Professionals*

Outline

- Introduction
- Financial Aid Data
- Federal Laws
 - Family Educational Rights and Privacy Act (FERPA)
 - *Higher Education Act of 1965*, as amended (*HEA*)
 - Privacy Act
- Frequently Asked Questions

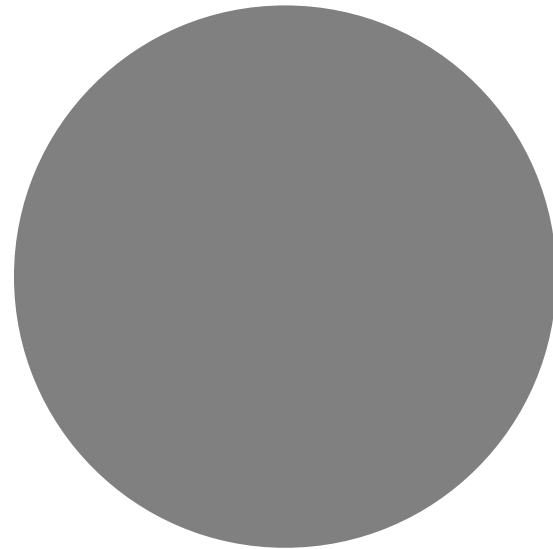
Introduction



Introduction

- The Department of Education has seen an increase in questions from schools about how they can use and disclose financial aid data.
- This presentation is intended to answer questions related to a school's disclosure to entities internal and external to the institution.

Financial Aid Data



Types of Financial Aid Information

- There are two, nonexclusive categories that can, generally, encompass student financial aid information:
 - *Free Application for Federal Student Aid* (FAFSA®) data, and
 - Personally Identifiable Information (PII) from education records.

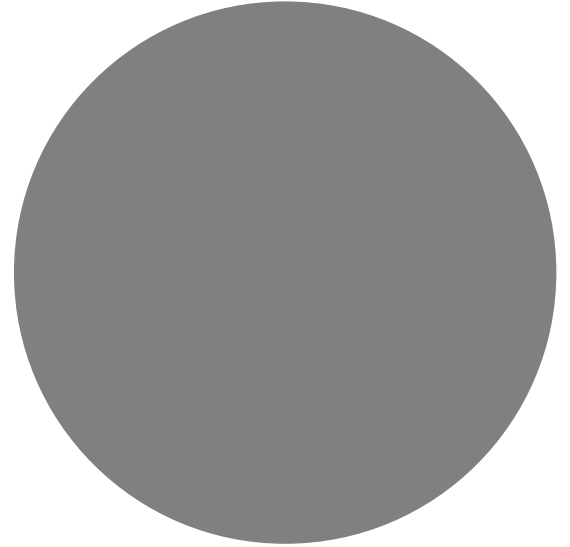
FAFSA Data

- FAFSA data refers to any information collected on the FAFSA and any information derived from the information collected on the FAFSA.

PII from Education Records

- Under the Family Educational Rights and Privacy Act (FERPA), an “education record” is any record that directly relates to a student and is maintained by, or on behalf of, an educational agency or institution or a party acting for the educational agency or institution.
- PII is information that, alone or in combination, is linked to or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty.

Federal Laws



The Family Educational Rights and Privacy Act

- Applies to all institutions receiving federal funds under any program administered by the Secretary of Education
- Gives parents and eligible students the right to access and seek to amend their students' education records
- Protects PII from education records from unauthorized disclosure
- Requires written consent before sharing PII – unless an exception applies

FERPA Exceptions

- FERPA has a number of exceptions to its general written consent requirement that permit educational agencies and institutions to disclose PII from education records without consent, provided that certain conditions are satisfied.
- Common exceptions include:
 - Financial Aid
 - School Official

FERPA Financial Aid Exception

- Under FERPA's Financial Aid Exception, institutions may disclose, without prior written consent, PII from student education records in connection with financial aid for which a student has applied or which a student has received, if the information is necessary to:
 - Determine the student's eligibility for the aid;
 - Determine the amount of the aid;
 - Determine the conditions for the aid; or
 - Enforce the terms and conditions of the aid

FERPA School Official Exception

PII may only be disclosed from education records without consent to other school officials with a legitimate educational interest within the institution, or to third parties acting as school officials, if they:

- Perform an institutional service or function for which the agency or institution would otherwise use employees;
- Are under the direct control of the agency or institution with respect to the use and maintenance of education records;
- Only use PII from education records for the purposes for which the disclosure was made; and
- Meet the criteria specified in the institution's annual notification of FERPA rights.

Higher Education Act (HEA)

- The HEA is the federal law that governs the administration of most Federal student financial aid programs, including *Title IV* aid.
- The HEA has privacy provisions that apply to:
 - Data collected on and derived from the FAFSA (including institutional award and disbursement information)
 - Data included in the NSLDS® (including data on the ISIR from NSLDS)

Higher Education Act (HEA)

- Section 483(a)(3)(E) of the HEA restricts the **use** of FAFSA data to the application, award, and administration of aid awarded under federal student aid programs, State aid, aid awarded by eligible institutions or aid awarded by entities designated by the Secretary of Education.
- Section 485B(d)(2) of the HEA prohibits nongovernmental researchers or policy analysts from accessing PII from NSLDS, while HEA section 485B(d)(5)(B) prohibits the use of NSLDS data for marketing purposes.
- Recent congressional actions have expanded the permissible uses of FAFSA data listed in section 483(a)(3)(E).

Continuing Appropriations Act, 2019

- On Sept. 28, 2018, the President signed the Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 (H.R. 6157; Public Law No: 115-245).
- Section 312 permits institutions to provide FAFSA data to the following entities that have been designated by the applicant to assist the applicant in applying for and receiving financial assistance for any component of the applicant's cost of attendance at that institution:
 - scholarship granting organizations,
 - tribal organizations, or
 - an organization assisting the applicant in applying for and receiving Federal, State, local or tribal assistance

Continuing Appropriations Act, 2019

- Disclosures made under Section 312 require:
 - the applicant's explicit written consent
 - the financial assistance designated by the applicant for any component of the applicant's cost of attendance at that institution to be consistent with the "cost of attendance" as defined in Section 472 of the HEA, and
 - the organization receiving this information to not sell or otherwise share the FAFSA data they receive from schools under this section.
- This section is in effect until the HEA is reauthorized.

Privacy Act of 1974

- Governs the collection, maintenance, use, and disclosure by federal agencies of records contained in the agencies' systems of records.
- Requires federal agencies to maintain a system of records to comply with a number of requirements, including, but not limited to, establishing appropriate safeguards to ensure the security and confidentiality of these records.

Privacy Act of 1974 (cont.)

- Generally, the Privacy Act prohibits federal agencies from disclosing records from their systems of records without prior written consent of the individual to whom the record pertains.
- There are a number of exceptions to this provision that can be found in 5 U.S.C. 552a(b).
- Section 552a(b)(3) and 552a(b)(5) are particularly relevant to the Department in terms of permitting the Department to disclose Privacy Act-protected student financial aid data to institutions.

Privacy Act of 1974 (cont.)

- Section 552a(b)(3) permits the Department to disclose a record without written consent for a “routine use,” which means the use of such records is restricted to purposes compatible with the purpose for which the record was collected.
- The specific routine uses allowed for each system of records are listed in the applicable System of Records Notice (SORN).
 - [Privacy Act System of Record Notice Issuances](#)

Student Aid Internet Gateway (SAIG)

- The SAIG was established to allow authorized entities, including postsecondary educational institutions and State Grant Agencies, to exchange data electronically with the Department.
- The SAIG Agreement establishes the conditions under which the Department will provide, to the authorized entity, certain data received or generated by the Department concerning FAFSA applicants as well as other Department data.

Student Aid Internet Gateway (cont.)

- The Department has a contractual agreement with every entity that receives financial aid information through the SAIG and all data uses must be consistent with this Agreement.
- Under the SAIG Agreement, access, disclosure, and use of data is limited to authorized personnel at the entity and only for the authorized uses described in the corresponding agreement.

What Does All This Mean?

- It means disclosing and using student financial aid information can often implicate more than one federal law.
- In instances where more than one law/regulation applies, the most restrictive provisions from each law will jointly apply.
- Determining permissibility for any use or disclosure of student financial information requires an institution to determine if the student financial aid information contains any PII from a student's education record, if the information is FAFSA data, or both.

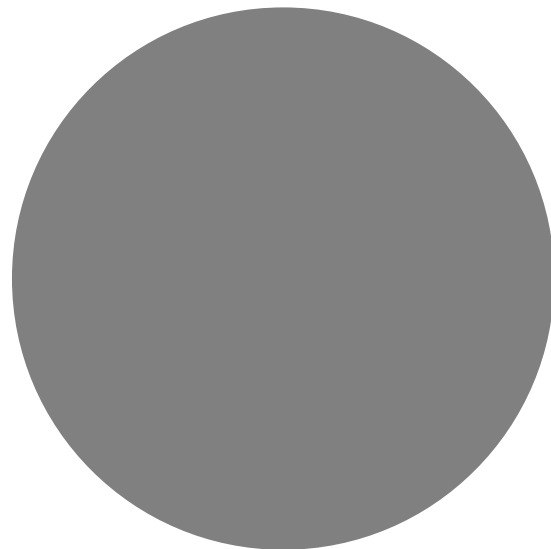
What Does All This Mean?

If the student financial aid information is **derived from information collected on the student's FAFSA**, the HEA's use restrictions will apply.

If the student financial aid information contains **PII from a student's education record**, then FERPA's provisions restricting disclosure and access to PII from education records will apply.

If an institution is using student **financial aid information from an ISIR of a student enrolled at that institution**, then it is likely that provisions from both FERPA and the HEA will apply to how the institution can disclose and use that information.

Frequently Asked Questions



FAQ: Students

Is it permissible for institutions to provide a student's FAFSA data to that student at their request?



FAQ: Students

Yes!

- Under FERPA, students generally have an affirmative right to inspect and review their education records.
- Under the HEA, institutions are not required to establish mechanisms to control or monitor how a student may use his or her own FAFSA data.

FAQ: Scholarship Granting Organizations

Is it permissible for institutions to disclose FAFSA data to third-party scholarship granting organizations, with the student's prior written consent, for the purposes of determining the student's eligibility and awarding aid to the student at that institution?



FAQ: Scholarship Granting Organizations

Yes!

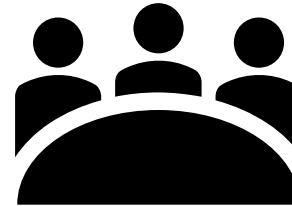
- Under FERPA, an institution may disclose PII from a student's education records to third-party scholarship organizations if the institution has obtained the student's prior written consent.
- Further, Section 312 of the Continuing Appropriations Act, 2019 explicitly states that an institution of higher education may provide FAFSA data to a scholarship granting organization, ***with the explicit consent of the applicant***, for the purposes of applying for and receiving financial assistance for any component of the applicant's cost of attendance at that institution.

FAQ: Scholarship Granting Organizations

- Meeting FERPA's standard for "prior written consent" is sufficient for meeting the standard of "explicit written consent" under Section 312.
- This section further dictates that a scholarship granting organization that receives FAFSA data shall not sell or otherwise share such information.

FAQ: Foundation Aid

May an institution disclose FAFSA data to that institution's foundation for the purpose of applying for and awarding the student with financial aid at that institution?



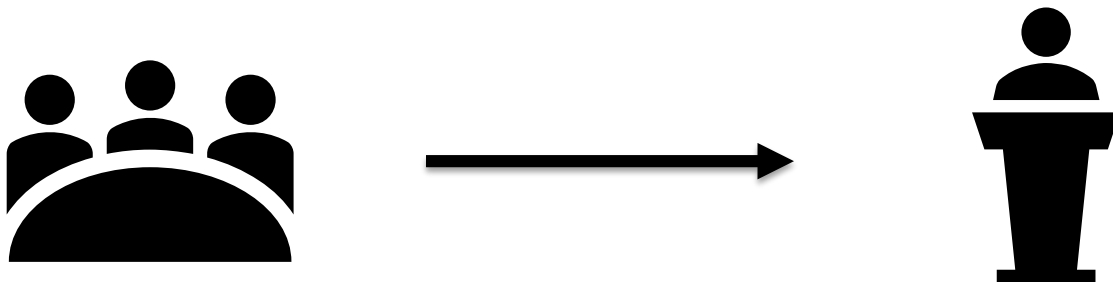
FAQ: Foundation Aid

Yes!

- Under FERPA, an institution may disclose PII from a student's education records to that institution's foundation if the institution has obtained the student's prior written consent. The institution may also provide such PII to its foundation without prior written consent under the financial aid exception to the consent requirement, assuming the criteria for exception is met.
- This use of FAFSA data by the institution's foundation would also be permissible under section 483(a)(3)(E) of the HEA to the extent that the student's FAFSA data is being used for the application, award, or administration of aid awarded by that institution.

FAQ: Disclosures to Donors

May a foundation responsible for administering an institution's financial aid provide the FAFSA data it receives from the institution to the foundation's donors?



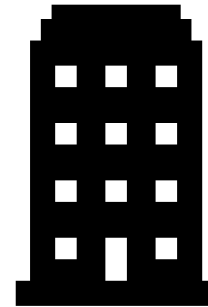
FAQ: Disclosures to Donors

Yes (in certain circumstances).

- Such disclosures of the PII the foundation receives from the institution would be permissible under FERPA to the extent that the disclosures are made with the student's prior written consent.
- The disclosure of any FAFSA data from the institution's financial aid foundation to its donors would be permitted under the HEA to the extent that the donors receiving the FAFSA data are only using it as a part of the ***application, award, or administration of the aid*** awarded by that postsecondary institution, pursuant to Section 483(a)(3)(E) of the HEA.

FAQ: Background Checks

Is it permissible for an institution to provide a student's FAFSA data, with the student's prior written consent, to an organization conducting an employment background check on the student?



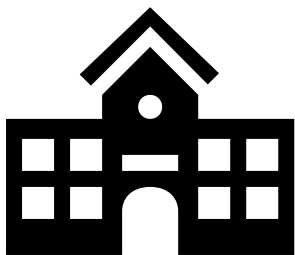
FAQ: Background Checks

No.

- Although, under FERPA, an institution may disclose PII from a student's education records to an organization conducting an employment background check on the student if the institution has obtained the student's prior written consent.
- The institution would **not** be permitted to disclose FAFSA data to the organization because the organization's intended use of the FAFSA data is not listed as a permissible use in Section 483(a)(3)(E) of the HEA. Using FAFSA data for employment background checks is not a part of the application, award, or administration of *Title IV* aid, State aid, or aid awarded by eligible institutions.

FAQ: Subpoenas

Can an institution provide a student's FAFSA data in response to a lawfully issued subpoena specifically requesting that student's FAFSA data?



FAQ: Subpoenas

It depends.

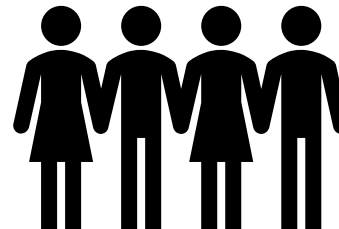
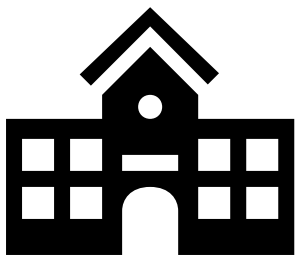
- FERPA permits the disclosure of PII from student education records without prior written consent in compliance with a lawfully issued subpoena or judicial order.
- However, please note that FERPA generally requires that an educational institution make a reasonable effort to notify the student of the subpoena or order in advance of compliance, so the student may seek protective action.

FAQ: Subpoenas

- In general, the disclosure of FAFSA data in response to a subpoena requesting FAFSA data is not permitted if the interest in such information is not related to the allowable uses under section 483(a)(3)(E).
- However, if the purpose in obtaining the information is related to the application, award, or administration of aid, as defined under section 483(a)(3)(E), then an institution may comply with the subpoena.

FAQ: Tribal Aid

Can an institution disclose a student's FAFSA data to tribal educational agencies of federally-recognized tribes?



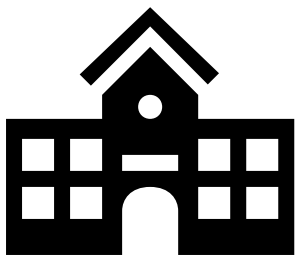
FAQ: Tribal Aid

Yes!

- Under FERPA, an institution may, with explicit written consent of an applicant who has completed a FAFSA under such section 483(a), provide FAFSA data to a tribal organization (defined in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5304)) to assist the applicant in applying for and receiving Federal, State, local, or tribal assistance for any component of the applicant's cost of attendance (defined in section 472 of the HEA) at that institution.

FAQ: TRIO Programs

In what ways can FAFSA data be used to apply for and administer TRIO program funding?



FAQ: TRIO Programs

Use of FAFSA data by TRIO program applicants and TRIO program grant recipients is **generally permissible** under the HEA. Specifically, an applicant or grant recipient may use FAFSA data:

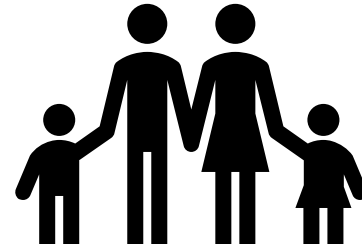
1. To support the entity's application to the Department to establish or continue a TRIO Program;
2. To determine student eligibility to receive grant aid under the Student Support Service Program; and
3. To determine student eligibility to receive TRIO program services.

FAQ: TRIO Programs

- FERPA can generally permit disclosures of PII from education records within an institution or to third parties with the student's prior written consent or without consent under the school official and financial aid exceptions, assuming the criteria for those exceptions are met.
- TRIO programs serving individuals not over the age of 18 or not enrolled at a postsecondary institution may be required to obtain prior written consent from the parents of those individuals before accessing their education records.

FAQ: Disclosures to Parents

Is it permissible for an institution to disclose a student's FAFSA data to that student's parent?



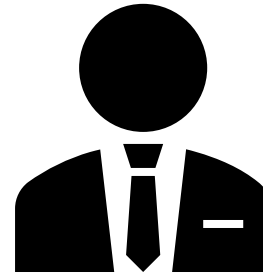
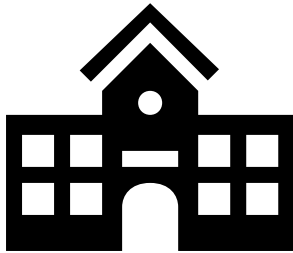
FAQ: Disclosures to Parents

Yes (in certain circumstances).

- Under FERPA, an institution may disclose PII from a student's education records to a student's parent if the institution has obtained the student's prior written consent, or without the student's consent if the disclosure meets the requirements of 34 CFR § 99.31(a), such as if a parent to whom the information is being disclosed claims the student as a dependent for IRS tax purposes.
- The HEA would permit the disclosure to the extent that the parent receiving the FAFSA data has requested it only for purposes consistent with the permitted uses in Section 483(a)(3)(E) of the HEA.

FAQ: Student Recruitment

May an institution use an individual's financial aid information provided by the individual on the FAFSA to recruit the individual who has not yet enrolled or tried to enroll at the institution?



FAQ: Student Recruitment

Yes!

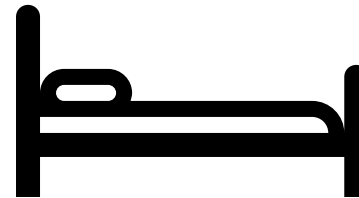
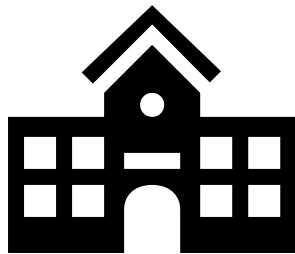
- If the individual elected to have their FAFSA information sent to the institution, the institution's admissions office may contact the individual about the application and admission process.
- The financial aid office may use the individual's financial aid information provided by the individual on the FAFSA to communicate proposed financial aid award information.
- FERPA is generally not implicated in such instances, as the individual is not yet in attendance at the institution.

FAQ: Student Recruitment

- The HEA would generally permit this use to the extent the institution's use of the FAFSA directly relates to the process of assisting the individual applying for, administering, or awarding *Title IV* aid, State aid, or institutional aid to the individual.
- However, even when permissible under applicable federal laws, institutions should consider whether nonconsensual use of PII in this fashion is consistent with institutional values, as well as State and local law.

FAQ: Student Housing

May an institution's housing office obtain and use FAFSA data to determine if a student qualifies for a housing fee deferral pending financial aid disbursement?



FAQ: Student Housing

Yes!

- This is permissible under the HEA to the extent that the use of the FAFSA data is necessary for the effective and efficient administration of *Title IV* aid.
- In this instance, using FAFSA data to determine eligibility for a housing fee deferral could generally be considered necessary for the effective and efficient administration of *Title IV* aid because the *Title IV* aid may be used to pay for the student's housing and dining expenses.

FAQ: Student Housing

- The disclosure of PII from the student's education records in this scenario could also be permissible under FERPA with the student's written consent or without the student's consent under the School Official exception, provided that the criteria for "school official" and "legitimate educational interests" in the institution's annual notification of FERPA rights have been met.
- That is, the institution must determine that the disclosure is to a school official with a legitimate educational interest.

FAQ: Social Service Assistance

May an institution provide a student's FAFSA data, with prior written consent, to a State or Federal means-tested benefit program for the purposes of applying for or receiving State or Federal means-tested benefits that could reduce the applicant's need to borrow or work during college?



FAQ: Social Service Assistance

Yes!

- Under FERPA, a postsecondary institution may disclose PII from a student's education records if it has the student's prior written consent.
- Section 312 of the Continuing Appropriations Act, 2019 (P.L. 115-245) states that if a postsecondary institution has the applicant's explicit written consent, then the institution may provide FAFSA data to an organization assisting the applicant in applying for and receiving Federal, State, local, or tribal assistance, that is designated by the applicant to assist the applicant in applying for and receiving financial assistance for any component of the applicant's cost of attendance (defined in section 472 of the HEA) at that institution.

Questions and Answers

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Thank You!